No. 12,592

IN THE

United States Court of Appeals

For the Ninth Circuit

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,

vs.

CLARA M. EAGLESON,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

APPELLANTS' REPLY BRIEF.

DAVIS & RENFREW,
Box 477, Anchorage, Alaska,
Attorneys for Appellants.

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SUMMARY OF ARGUMENT.

I. The main question for consideration is the interpretation of the authorization to sell. Such authorization did not create an exclusive right to sell but at most created an exclusive agency to sell.

II. No sale was made until after May 1, 1949.

III. Appellee was not instrumental in selling the property.

IV. Appellee never negotiated with the buyer and was not entitled to negotiate with him.

V. The jury verdict might have been based on any one of several alternatives and accordingly it can't

be said that certain propositions have or have not been determined by jury finding.

VI. Pleadings were closed prior to applicability of the Federal Rules and under applicable Alaskan Law a Reply should have been filed.

VII. The motion for judgment on the pleadings or for summary judgment should have been granted.

VIII. Plaintiff changed her whole cause of action after the evidence was in. This case involves a failure of proof, not a variance.

IX. Under the evidence and the exhibits, the only instruction necessary was an instruction of a verdict for defendants.

X. The judgment should be reversed with instructions to enter judgment for defendants.

ARGUMENT.

Appellants believe that the first question to be decided is the meaning of the "Authorization to sell", Plaintiff's Exhibit 1.

Appellants are willing to concede that many Courts allow a broker a commission where he had exclusive authority to sell, even though the sale be made by the owner without aid from the broker, where the sale is made in the applicable period and where the agreement specifically requires such payment. *Confer Bros. v. Colbreath* (Minn., 1921), 183 N.W. 524, cited by appellants, is a good example of that rule.

Appellee in her brief concedes that a mere listing of property for sale with a broker does not entitle the broker to a commission where the owner makes the sale unaided. She further concedes that an agreement granting the broker "an exclusive agency" does not entitle the broker to a commission where the owner makes the sale unaided by the broker. *Donahue v. Reiner Co.* (R.I., 1925), 127 Atl. 359, cited by appellee, fairly presents this view.

The cases are split as to whether an exclusive sale agreement is not in fact an exclusive agency agreement.

Harris v. McPherson (Conn., 1922), 115 Atl. 723, cited by appellee, recognizes this split in authority and the dissenting opinion in that case argued that the words "Exclusive sale" are ambiguous as applied to the authority of a broker and that in a simple contract devoid of unusual promises by the broker ought not to be construed as conferring unusual authority, especially when, as in that case (also in the case at bar) it was found in a printed form prepared by the broker and submitted to the owner for signature.

Each case is decided on the language of its particular agreement. Thus the case of *Greene v. Minn Billiard Co.* (Wis., 1920), 176 N.W. 239, cited by appellee, specifically distinguishes *Roberts v. Harrington* (Wis., 1918), 169 N.W. 603, decided by the same Court two years before.

It seems to be a general rule that before the Courts find that an agreement is such as to entitle the broker to a commission where the property is sold by the owner unaided by the broker, the language used must be clear and unequivocal requiring that ruling and negating the right of the owner himself to sell without being liable for the commission. Each of the cases cited by appellee so holding are specific in that regard and each of such cases read by the writer of this brief were based on clear and unequivocal agreements.

As samples of cases holding that the agreement did not entitle the broker to a commission where the owner sold the property unaided by the broker appellants call the Court's attention to the following:

Roberts v. Harrington (Supreme Court Wisconsin, 1918), 169 N.W. 603, above cited. The agreement there gave the agent "the exclusive sale" of the property for a certain period. The owner sold the property during that period. Judgment by the lower Court for the broker was reversed with directions for dismissal on the merits.

The Court in construing the language "exclusive sale" held that such language does not preclude sale by the owner without liability for a commission unless *"the language is so clear and unambiguous as not to bear any other."* "the words 'exclusive sale' may well mean 'exclusive agency to sell,' the idea being that the owner shall employ no other agent".

The opinion of that Court, at page 604, might very well have been written as applying to the case here under consideration. We invite the attention of the Court to the same.

Stensgaard v. Smith (Minn., 1890), 44 N.W. 669, involved a writing which in many ways is similar to Plaintiff's Exhibit 1. It was contained mostly in a printed form. It purported in one sentence to give the broker "the exclusive sale of the property" for a specified period. In another section the owner agreed to pay a commission to the broker *"for his services rendered in the selling of"* the property. It was signed by the owner but not by the broker. In that case, as in the one we are here considering, the broker advertised and solicited customers. The owner sold the property himself during the period covered by the agreement. Lower Court judgment for the owner was affirmed. The Court held the writing good as a present and revocable grant of authority to sell, but held there was no consideration and no mutuality of obligation to sustain the alleged exclusive nature of the right to sell. The Court further found that commission was to be paid only in case of a sale by the broker. He didn't sell and he earned no commission.

Sunnyside Land & Investment Co. v. Bernier (Supreme Court of Washington, 1922), 205 Pac. 1041, construed an agreement set out in full in the opinion at page 1042. The agreement there construed is much more favorable to the broker than the one we have here. It purports to be based on a valuable consid-

eration. The broker there specifically agrees to endeavor to sell the property. The commission clause provides that the owner "will *in case of sale* or, if said second party is instrumental in finding a purchaser pay * * * etc." The owner sold the property himself during the contract period. Judgment for the owner rendered by the lower Court was affirmed.

The Court held that the words "exclusive right to sell" amounted to no more than an "exclusive agency to sell" and did not preclude a sale by the owner himself without making him liable to pay a commission. The Court further held that the language as to commissions "in case of sale" rendered the owner liable to pay a commission only in a case where the buyer was procured by the broker and not liable where the broker had nothing to do with the sale.

The *Sunnyside* case, above digested, was specifically followed in the case of *Elson v. Sanders* (Washington, 1922), 209 P. 842.

See, also, *Waterman v. Boltinghouse* (Cal., 1890), 23 Pac. 195, where the broker had an agreement granting "an exclusive right to sell." The owner sold the property during the period. Judgment for the owner was affirmed. The Court intimates without so deciding that a suit for damages for breach of contract might lie, but finds no commission due.

See, also, *Wozniake v. Siegle* (Ill., 1922), 226 Ill. App. 619, digested 64 A.L.R. 398. There the agreement in one paragraph designated the broker as "ex-

clusive agent." In a later paragraph it provided that if the property was sold either through the broker or any other person that the commission would be paid. Judgment given the broker for the commission by the lower Court was reversed. The Court held that the two sections were inconsistent one with the other unless the agreement was construed as granting a sole agency only. The Court further held that if the words "any other person" were to be construed as applying to the owner that the phraseology of the instrument all taken together would be conflicting. The Court further held that the law requires that all the contents of an agreement must be considered and weighed and coordinated in construing an instrument, that the particular agreement was one of exclusive agency and not one granting an exclusive power of sale. Therefore, the owner had the right to sell without obligating himself to pay a commission.

Attention of the Court is invited to 64 A.L.R. 410, Headnote III, Section A, Subsection 1, entitled "Contract conferring exclusive right to sell, sale by the owner, purchaser not produced," together with cases cited in the annotation.

Was the agreement, Plaintiff's Exhibit 1, as extended, such as to give the broker a right to a commission even though the property was sold within the applicable period where it was sold without the aid of the broker? In other words, did this agreement give the broker the exclusive sale of the property? We believe it is clear that it did not.

As previously pointed out, the agreement was the work of the broker and in case of doubt is to be construed against her.

Appellee claims in her brief (page 9) that the agreement "was clearly an exclusive right to sell" or "exclusive sale." She argues that it so provides in so many words, and it does if one takes those words out of context. However, the only place the words "exclusive sale or transfer," or anything similar, appears in the agreement is in the fourth and fifth lines thereof and such words specifically refer to a sale of real estate. The property here involved admittedly is not real estate. Appellee's agent Rentschler in his testimony (R. 75) admitted that no real estate was involved and that that portion of the contract was surplusage.

Appellee also claims that the agreement provided that the property was *"listed exclusively"* with the broker. Again that is true. An exclusive listing is nothing more than an exclusive agency. As previously shown, appellee concedes that an exclusive agency does not require payment of a commission if the property is sold by the owner without the aid of the broker. It merely prohibits sale through another agent or broker.

Appellee says that the agreement is clear and unambiguous. (Brief 14.) We submit that the two sections of the agreement hereinabove quoted are inconsistent one with the other. If appellee had exclusive right to sell then she could recover a commission even

though she did nothing to promote the sale. If she had merely an exclusive listing or an exclusive agency then she is not so entitled to recover any commission without proof that she was instrumental in making the sale.

Appellee claims that the agreement provides that a sale by the owner "shall work no forfeiture in the commission due the agent" and so it does, but as pointed out in appellants' opening brief (p. 32) that clause could very well mean that any sale by the owner to a party procured by the broker, or to a party with whom the broker had negotiated during the term, or a sale in which the broker was instrumental would work no forfeiture of the commission. In fact, a proper construction of the entire agreement would find that is exactly what it did mean. Also, as pointed out in our opening brief (p. 32), appellee was only entitled to a commission on certain conditions. Except those conditions were fulfilled there was to be no commission and if there was no commission there could be no forfeiture of commission.

By the specific terms of the agreement, commission is to be paid only in consideration of the broker doing one or more of the things mentioned therein. If we were to construe this agreement as an exclusive sale agreement as argued by appellee then the language in the agreement which reads:

> "In consideration of the services of the agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner

> whatever in selling or transferring said property, I agree to pay said agent * * * a commission * * * etc."

is meaningless and that is the only language in the agreement which provides for any commission.

It seems to us that the language above quoted specifically negatives any intention of the parties to make an exclusive sale agreement where the broker would be paid even though she did not perform as there set out.

We believe that the written agreement is ambiguous, that it does not specifically negative the right of the owner to sell without subjecting himself to pay a commission, and that in any case it should be construed against the broker as being no more than an exclusive agency to sell.

Appellee claims that all the parties understood the agreement as obligating appellants to pay a commission regardless of who made the sale. In support of that contention she quotes from page 198 of the record where appellant Lawrence White testified that "I told Mrs. Eagleson that she had the exclusive on it until April 30th and I would not sell to anyone." That language is only part of the testimony and should be construed with the other testimony of the witness as part of the same cross-examination. (See R. 198, 199, 200.)

> Q. And you knew that if you sold during the month of April you would have to pay a commission to Mrs. Eagleson?

A. Providing a client came through her.

Q. Whether or not the client came through her if you sold in the month of April?

A. If she was instrumental in getting the party to buy, yes, sir.

Q. Didn't you understand that you had to pay a commission during the month of April regardless of whether she had anything to do or not?

A. No. (See p. 200 two-thirds of the way down.)

Along this line we believe it is significant that appellee herself apparently considered the agreement as merely creating an exclusive agency until after she had failed to prove that she was instrumental in making the sale.

We believe we have shown that the agreement which is the subject of this suit should not be interpreted as granting an exclusive right to sell to appellee. If that is correct then the time of sale is unimportant unless appellee has shown that she was instrumental in selling the property or that the property was sold within sixty days after April 30 to one with whom appellee negotiated between April 8 and April 30.

We contend that there is no competent evidence of a sale prior to May 1 by anyone and no competent evidence of a sale at any time to any person with whom appellee negotiated.

The most that could be said of the testimony of Easley and of Dayton was that White had told them

he was selling, not that a sale was made. (R. 100, 101, 124, 127.)

Appellee also testified that White told her on April 23 that he had sold the place (R. 156), but taking her whole testimony together it is apparent she must have meant that White told her he had an offer which he would have to accept unless she could get a better one. (See R. 141, 150, 151, 152, 154, 156, 157, 158.) He specifically told her he would have to sell to Pickering if she didn't get a better offer.

This conversation was some time after appellee claims the property was sold and two days after the contract to sell between the owners and Pickering had been prepared.

The only direct evidence as to when the property was sold is that of White and of Pickering. Both testified and it stands absolutely undisputed that the consideration was finally arranged and was paid on May 1 and the draft of contract previously drawn was signed then. The acknowledgements showed that the contract was signed May 2. No proof of any kind was offered to the contrary.

Appellee claims that an actual sale was made in April but that papers were not signed until May to give it an appearance of a sale in May to beat her out of her commission. There is absolutely no evidence to support that contention. It seems that appellants were more than fair with appellee. Even though she had no exclusive sale agreement the nego-

tiations with the buyer were specifically made subject to a prior sale by appellee at any time prior to May 1. That evidence is undisputed. Appellee made no effort to rebut it.

Appellee cites *Mercantile Trust Co. v. Lamar* (Mo., 1910), 128 S.W. 20. That case is apparently a minority decision but in any event it can be distinguished from this case in that the owner there sold to the customer interested by the broker.

The case of *Lewis v. Dahl* (Supreme Court of Utah, 1945), 161 Pac. 362, 160 A.L.R. 1040, is cited by appellee but not otherwise mentioned. In that case the broker had an agreement whereby the owner specifically agreed to pay a commission if he sold the property during the term. The purchaser admittedly negotiated with the owner during the term of the broker's agreement. The conveyance was made after expiration of the agreement. The broker claimed that a sale was actually consummated during the term but completion was delayed as a means of beating him out of his commission. The broker did not procure the purchaser. Judgment for the broker by the trial Court was reversed with directions to enter judgment for defendants.

Evidence in that case was much stronger for the broker than here.

The Court said:

> "Until the purchaser is bound, there is no sale, and the length of time during which negotiations are conducted which finally lead up to the sale,

> is immaterial. Until or unless there is a sale within the term of the listing agreement there can be no right to a commission."

See, also, *Annotation,* beginning at page 1048, of 160 A.L.R. and the cases there cited on this point.

The general statute of frauds of Alaska is 58-2-2 *Alaska Compiled Laws Annotated,* 1949, and reads as follows:

> "58-2-2. In the following cases an agreement is void unless the same or some note or memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged or by his lawfully authorized agent:
>
> First. An agreement that by its terms is not to be performed within a year from the making thereof."

Appellee claims that a complete sale was agreed upon between the owner and the purchaser before May 1, and that the contract of sale had been drawn following that agreement before May 1 and signed on May 1 or 2. That agreement admittedly was not to be performed within a year from its making. Such an oral agreement even if proved would have been void and unenforceable.

The Alaska statute of frauds as to sales of personal property is 29-1-12, (1) *Alaska Compiled Laws Annotated,* 1949, and reads as follows:

> "29-1-12. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforce-

able by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Admittedly the goods in question was personalty and of a value of more than $500. No consideration was given until May 1. Under the terms of the contract (see Exhibit 2, see appellee's brief 6), possession of the property was given May 1. No note or memorandum was signed by either party, until May 1.

Under these sections it seems clear that even though an agreement had been reached in April it was unenforceable and void as against the buyer.

We feel that there was no issue to go to the jury on the question of time of the sale.

In her brief, appellee claims she was entitled to a commission even though her contract was not exclusive and even though sale may not have been made in April.

First, she claims she advertised the property and that the advertising was productive since more than ten prospects were conducted through the premises. We submit that the record shows that appellants were not interested in conducting prospects through the premises. They wanted to make a sale. Conducting

an average of one prospect per month through the premises did not promote a sale. The advertising didn't produce a single offer at any figure. (R. 80, 84, 152-153.) Admittedly, appellee did not make a sale, or transfer. She did not send a buyer. She did advertise but got no prospects ready to buy the property. We believe the word "advertise" used in the agreement is modified by the words "or being instrumental in any manner whatever" which follow it and that fruitless advertising does not entitle plaintiff to a commission.

Secondly, appellee claims she was instrumental in selling the property because she says she stimulated Pickering to buy. She says she was working by indirect methods to that end and got Pickering to raise his price.

It is interesting to note that in *Bethel v. Preston* (Wash., 1930), 290 Pac. 224, cited by appellee, the prospect in question was a prospect procured by the broker, called to the attention of the owner by the broker, and known by the owner to be the broker's principal prospect.

In this case there is no evidence at all that any actions of the broker stimulated Pickering at all. If one believes Pickering, the entire sale had been negotiated between the owner and himself early in April, subject to his raising the money and subject to a prior sale by appellee. Both parties who knew anything about it testified that there was no haggling over price

or terms and that the sale was specifically contingent on Pickering raising the down payment and upon prior sale by appellee.

It is true appellee claims that White told her Pickering had offered $30,000 and that her efforts must have been productive in getting him to go to $35,000, but that testimony is pure speculation and is contrary to all the evidence. If, as appellee claims, the sale terms were complete prior to April 20 and that a written draft of agreement was made at that time which showed a sale at $35,000, then appellee must have been mistaken as to the conversation which she says took place three days later, on April 23. There is no evidence at all that the three prospects conducted through the premises in April or the one prospect seen by Pickering "showed sufficient interest so that Pickering might think the property was being sold out from under him" as Rentschler explained the deal. In fact, only one of such prospects showed any interest and no information concerning that prospect was given White until April 23, after appellee claims the property was sold. There is no evidence that Pickering ever was advised of any interest by any prospect produced by appellee.

Appellee says there is ample evidence that her acts were instrumental in making the sale. We say there is no such evidence.

Third, appellee claims she is entitled to recover because appellants wouldn't let her deal with Pickering. We say that under the terms of the contract appellee was not entitled to deal with Pickering.

We believe it is evident that the Court erred in instructing the jury in giving the portion of Instruction IV excepted to by appellants. Under the contract, as previously shown, appellee at best had an exclusive agency contract. The owner had no duty to refer his prospect to her. The contract didn't provide that the broker was to get a commission if a sale was made within sixty days to a buyer procured by the owner and as to whom the broker had been warned away. There is no fraud here. The broker was advised at all times that Pickering was White's prospect even before the extension was granted.

Granata v. Mothner (Texas, 1931), 44 S.W. (2d) 817, cited by appellee, involved an exclusive right to sell. The language as to referral of a purchaser is dictum as the case was reversed on other grounds.

At several places in her brief appellee asserts that the jury found in favor of appellee, that there was ample evidence to go to the jury and that disputed questions of fact have now been decided.

It is difficult to determine what the jury did or did not find. The verdict was a general one for the plaintiff. The Court in Instruction Number II said the burden was on plaintiff to prove that plaintiff was instrumental in procuring a purchase by Pickering. As we have shown, such a finding would be surplusage if the agreement was one of exclusive sale.

In the next paragraph of the same instruction, the judge said that the principal question for the jury was as to whether the property was sold during the

life of the agreement. That would only be important as a principal question in case the agreement gave an exclusive sale. Otherwise, the question as to instrumentality of plaintiff in making the sale would be at least of equal importance.

In Instruction III the Court specifically instructs the jury that the agreement was one of exclusive sale and that defendants were liable for the commission if they sold the property during the life of the agreement or within sixty days after April 30, 1949 to any person with whom plaintiff had negotiated prior to that date. At that point the question as to whether appellee was or was not instrumental in making the sale became of no importance whatsoever. A verdict for plaintiff could mean that the jury found either that the sale was made by defendants before April 30 or that it was made after April 30 to one with whom plaintiff had negotiated.

To complicate matters still further, Instruction IV set forth a contention that if the property was actually sold before April 30 but the transaction was given the appearance of being a sale after that date and if plaintiff was dissuaded from negotiating with Pickering for the purpose of defrauding plaintiff out of her commission, then the verdict should be for plaintiff for $3,500. Then comes the language to which appellants excepted, which was to the effect that if plaintiff would have negotiated with Pickering except that she had been warned away by White, then plaintiff would be entitled to a commission if the sale were

made within 60 days after April 30. The jury could very well have decided that White requested Eagleson not to talk to Pickering, which he admitted, that Eagleson might have talked to Pickering except for White's request, and that since the sale was admittedly made not later than May 1, which was less than 60 days after April 30, that plaintiff was entitled to a verdict. In that case the jury was not required to pass upon either the instrumentality of plaintiff or the time of the sale to find for the plaintiff.

It is our belief that the agreement was not one of exclusive sale. We believe there is no competent evidence that plaintiff was instrumental in making the sale. We believe there is no evidence to justify a finding that a binding sale was made prior to May 1. The evidence is all to the contrary and the Court completely ignored the statutes of frauds. We believe appellant White was within his rights in requesting the broker not to contact Pickering and that such request does not have the legal effect of allowing plaintiff to claim she would have negotiated with Pickering if White had not requested her not to do so and we believe it certainly does not follow that she was entitled to recover upon a sale being made after April 30 as though she had negotiated with a purchaser with whom she had no dealing.

Several technical matters have been raised by appellee.

We claim that the pleadings in this case and admission of the parties under such pleadings were

closed prior to the extension of the Federal Rules to Alaska and that the pleadings were governed by Alaska law. We admit that procedure at the trial was governed by the Rules.

We claim that under Alaska law and under proper interpretation of Plaintiff's Exhibit 1, that the allegations of the answer to the effect that defendants themselves had sold the property without the aid of the broker was new matter which required a reply. Technically, it should have been set forth in separate paragraphs, but failure of plaintiff to object waived that defect. We believe the Court should have granted the motion for judgment on the pleadings or for summary judgment.

We believe plaintiff failed to prove her case. Submission of the matter to the jury on another theory wasn't a variance. It was an entirely new cause of action. In fact, it was three new causes of action. No one in the case had any inkling that plaintiff was claiming an exclusive right to sell or that she was claiming a sale in April in fact but in May in appearance, or that she was claiming the right to commission even on a sale after April 30 until she requested her instructions. The Court himself during the examination of plaintiff's last witness recognized that the material question was as to whether plaintiff had procured a purchaser. (R. 137.) The suit as laid was for commission. The suit as it went to the jury was for damages for breach of contract or for fraud or something else.

We recognize that pleadings are not all important and are only a means to an end, but we believe the number of questions before this Court in this matter show conclusively that pleadings and a somewhat consistent theory of the case are much to be desired.

Appellants infer that since no objections as to instructions were taken except as to part of Instruction IV, objections may not now be made. That is true, of course, and we are not making further objections now, but we believe that under a proper interpretation of the authorization and giving the evidence its every lawful intendment in appellee's favor, that there was no competent evidence to go to the jury and accordingly the only instruction necessary was one directing verdict for appellants.

It is our sincere belief that nothing in the evidence or in the law justifies a verdict or a judgment in favor of appellee and we respectfully submit that the judgment should be reversed with directions to enter judgment for defendants.

Dated, Anchorage, Alaska,
July 11, 1951.

Respectfully submitted,
DAVIS & RENFREW,
By EDWARD V. DAVIS,
Attorneys for Appellants.